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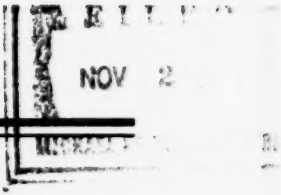


IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

**No. 73-562**

LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY, and HARRY RUBENSTEIN, his attorney,

*Petitioners,*

v.

DICKSTEIN, SHAPIRO & GALLIGAN, now known as COLSON & SHAPIRO, et al.,

*Respondents.*

**Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITIONERS' REPLY BRIEF

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KEENAN PRINTING COMPANY

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## PETITIONERS' REPLY BRIEF

### Prefatory Statement

The Respondents, in their opposition brief, clearly have failed or have simply refused to recognize the substance of Petitioners' challenges to the findings of the courts below, and have failed to respond to any of the issues presented therein.

Moreover, an intervening event on October 17, 1973, has destroyed the major rationale of the Lower Courts in denying a fee to Attorney Rubenstein for an admitted monetary accretion to the National Class of Wholesale-Retail Druggists. On that date, in the Federal District Court of Minnesota, the same defendants as in the instant

litigation made a $36 Million settlement with plaintiffs who had opted out of the instant litigation, even though the reversal of the criminal conviction of the defendants remained at the time of this settlement.

## I.

## BY DENYING FEES TO AN ATTORNEY FOR A MEMBER OF A NATIONAL CLASS BASED UPON PECUNIARY BENEFIT ACHIEVED FOR THAT CLASS, THE LOWER COURTS STIFLED DISSENT, DENIED THE RIGHT OF APPEAL AND DEPRIVED ABSENT CLASS MEMBERS OF THEIR RIGHT TO PROPERTY WITHOUT DUE PROCESS OF LAW AND DESTROYED ADEQUACY OF REPRESENTATION WHICH IS AN ESSENTIAL ELEMENT OF A CLASS ACTION.

Respondents contend that stifling of dissent is not at issue in this appeal, offering as proof that certain dissenting members of the Wholesaler-Retailer Druggist Class (hereinafter referred to as the Druggist Class) were awarded fees based upon their dissent (see Pet. App. A46-A49)). Knowledge of the facts involved show that indeed the opposite is true. Attorneys Berman and Walner, the dissidents to whom respondents refer, did not file under Rule 23 (c) (2) (c), and were among the originally joined parties to the action and members of the Committee of Counsel for the Druggist Class. By order of the District Court, they were removed from the Committee specifically because they dissented, and fees subsequently granted to them were based solely upon the work done by Berman and Walner while members of the Committee, fees being specifically denied for their efforts as dissenters, particularly their joining in the appeal with Attorney Rubenstein that brought the accretion to the Druggist Class of $650,000. (See particularly Pet. App. A47, A49, para. 2). By the removal of Berman and Walner from the Committee, through the denial of fees to these

attorneys for their efforts as dissenters, and in denying fees to Attorney Rubenstein for the increments accruing to the Druggist Class as a result of the first appeal undertaken, the District and Appellate Courts have unmistakenly stifled dissent and therefore it is at issue. If any slogan could be applied to aptly describe the Tetracycline case, it would be "not one cent for dissent".

The Respondents' contention that no benefit accrued to the Druggist Class through the Rubenstein appeal lacks foundation in both law and fact. That appeal was brought by Rubenstein to reverse the District Court ruling which, based upon false affidavits put forth by Respondent Colson & Shapiro, found the Druggist Class to be a nuisance class. These affidavits, of William S. Apple and William Walker, alleging that all druggists uniformly price their prescription drugs 66⅔% over cost, were based solely upon their personal "knowledge and experience" and were not supported by any empirical evidence (see J.A. pp. 220-224). Subsequent to his first appeal, Attorney Rubenstein, in the District Court, in this litigation and in the Ampicillin Antibiotic cases now pending in Washington, introduced proof that there was no such uniform markup, which was then admitted by one of the defendants in the present litigation. The basis of his proof was contained in two independent studies, "Pharmacy Charges for Prescription Drugs" (a statistical survey compiled by R. A. Gosselin and Company, Inc.), and "Prescription Costing and Pricing Methods" (a study by professor S. B. Jeffries, Brooklyn College of Pharmacy). The statistical survey of Gosselin and Company involved professors throughout the United States, including professors from the Harvard Graduate School of Business, and was based on an examination of a half-million prescriptions and 2,600 representative pharmacies throughout the United

States, establishing, conclusively, that there was no such uniform markup. On this basis, the District Court's opinion in the first appeal and the Court of Appeals' opinion in the first appeal, were founded on a false basis of using Shapiro's-Apple's affidavits to establish a cost-plus exception to the *Hanover Shoe* rule of this court. *Hanover Shoe* v. *United Shoe Machine Corp.*, 392 U.S. 481 (1968). So convincing was this proof by Attorney Rubenstein that now, not even the defendants contest the fallacy of the uniform mark-up concept.[1]

Although not available at that time, these proofs indicate that the appeal taken by Rubenstein to overturn the District Court's uniform mark-up ruling was not frivolous and, if successful, would have brought a tremendous increment to the class. With this in mind, it would not be in the best interests of the Druggist Class for Attorney Rubenstein to accept Attorney Shapiro's settlement offer of $650,000 to refrain from appeal when first, that amount was assured his class anyway, if he preserved the appeal beyond November 23, 1970, and secondly, the class stood to gain much more by appeal.[2] Even so, the $650,000 did

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1. It should be noted that it was to this District Judge, whose opinion was established to be erroneous by Attorney Rubenstein, that Attorney Rubenstein had to go for fees for the accretion to the Druggist Class that he achieved by his appeal, in the sum of $650,000.

2. It is to be noted that if Attorney Rubenstein accepted the $650,000, he would have assured himself of a fee. However, the duty to his class in an appeal, the validity of which has now been subsequently established, was the overriding consideration, and the refusal of the Lower Courts to grant him a fee that he was assured of without any extended effort in order to protect his class, defies comprehension and certainly illustrates that he

not come easily. The Respondents herein filed a motion in the Appellate Court attempting to dismiss Attorney Rubenstein's appeal before November 23, 1970, which Attorney Rubenstein successfully argued and won, thereby preserving the appeal and the $650,000 increment to the Druggist Class, which had been abandoned by everyone, including the Committee of Counsel for the Wholesaler-Retailer Class—thus revealing graphically that Attorney Rubenstein was, in effect, acting not in behalf of his own client but in the interests of the National Class of Wholesale-Retail Druggists, which class received the benefit of this accretion and not Attorney Rubenstein's client.

A further argument of Respondents, as well as the lower courts, was that the appeal was not in the best interest of the Druggist Class, the contention being that, in view of the reversal of the criminal convictions of the defendants, the defendants may have walked away from the settlement if the Rubenstein appeal had prevailed. However, as pointed out in Petitioners' Brief, the aim of the appeal was redistribution—not the overturning of the unallocated settlement. In addition, any conceivable validity in this contention has since been nullified by the recent proceedings on October 17, 1973, in In Re Coordinated Proceedings in Antibiotic Antitrust Actions, 4-71 Civil 435 (D.C. Minn. Fourth Division), wherein the same defendants entered into a thirty-six million dollar settlement with those plaintiffs who previously opted out of the consolidated multi-district class action in the instant case —this settlement by the defendants being entered into

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was neither acting for himself nor for his own client, who only would receive a miniscule portion of this substantial accretion and that, therefore, he could only be acting for and in the interests of the National Class of Retail Druggists.

while the reversal of the criminal conviction still stands. This renders the argument of the lower courts for not awarding Attorney Rubenstein a fee for his concrete accretion to the class (which the Appeals Court admitted would have gone to the CCS class) a nullity.

The Respondents fail to come to grips with the issues presented in Petitioners' Brief, among them that by his appeal, Attorney Rubenstein brought a benefit to the Druggist Class of $650,000; that the appeal did not endanger the class because, as evidenced by the proceedings in Minnesota, the defendants were in no position to wash their hands of the settlement, their bargaining position being no better or worse with or without the guilty finding in the criminal action from which this civil action springs; and that the appeal was in the best interests of the Druggist Class since, if successful, it would have increased the allocation to the class by millions of dollars. Further, the only other dissenter was blatantly discriminated against by the District Court, and the denial of fees was just another means by which the District Court denied the right to dissent, and effectively destroyed representation of the absent class members.

The reasoning of the District Court and the Court of Appeals that one who files under 23 (C) (2) (c) is appearing only for his client and not for the class and therefore must be paid by his client, is a novel and damaging statement of law which makes a nullity of the section of Rule 23 which allows absent class members to join an action and actively protect their rights, and consequently the rights of all those absent members. It is inconceivable that one who has a small monetary interest in the outcome of the case could possibly afford the costs of meritorious appeals, or indeed should be forced to sup-

port the burden of an appeal which benefits, not only himself, but all of the members of the class. To do this is not only in contravention of the *Sprague* v. *Ticonic*[3] doctrine, but also makes the "opt out or remain joined" provision of Rule 23 (C) (2) (c) a Hobson's choice, which was neither the purpose nor the intent of the framers of this Rule. In order to insure that joined members be able to protect their rights and also the rights of the absent members, this Court is compelled to grant certiorari.

## II.

**THE COURT OF APPEALS ERRED IN AFFIRMING A COURT AWARD OF "REASONABLE" ATTORNEY'S FEES TO AN ATTORNEY FOR THE GOVERNMENT ENTITY CLASS FROM THE FUND OF THE WHOLESALER-RETAILER CLASS, WHERE SUCH AWARD AMOUNTED TO DOUBLE COUNSEL FEES AND REWARDED AN ATTORNEY WHERE HIS ANTAGONISTIC CONFLICTING INTERESTS HAD AN INFLUENCE UPON HIS CONDUCT—ALL IN DEROGATION OF EQUITABLE PRINCIPLES.**

Respondent's Brief is also unresponsive to the issue of a "reasonable attorney's fee" being awarded to Attorney Shapiro out of the fund of the Druggist Class by the District Court. Attorney Shapiro was retained by the CCS Class members on a contingency fee basis—and yet was awarded the abovementioned "reasonable fees" from the Druggist Class—whose allocation of the global fund it was in the interest of Shapiro to delimit as far as was

3. 307 U.S. 161 (1939).

possible. In his Brief, Respondent continues to maintain the bald assertion that a benefit has been bestowed upon the Druggist Class by the mere creation of the fund. However, such assertion merely begs the question and does not justify the "reasonable" award; and vague reference to the doctrine of *Sprague* v. *Ticonic*[4] does not justify characterizing a victim as a beneficiary.

As stated in Petitioners' Brief, by the demand of the defendants, Attorney Shapiro had no alternative but to include the Druggist Class in the global settlement. That his intent thereafter was always to delimit that inclusion is borne out by both his words and deeds. The affidavits of William Apple and William Walker mentioned earlier in this Reply Brief were the sole cause for the classification of the Druggists as a nuisance class—and these affidavits were presented to the District Court by Attorney Shapiro. In affidavits in objection to Shapiro's award, filed by members of the Committee of Counsel for the Druggist Class, reference is repeatedly made to Attorney Shapiro's inimical attitude towards the Druggist Class. Co-Chairman of the Committee Richard F. Levy stated in his affidavit that:

> "Mr. Shapiro's position throughout these proceedings, as repeatedly communicated to me, has been wholly antagonistic to the interests of the Wholesaler-Retailer [Druggist] Class."[5]

For Attorney Shapiro to now seek shelter under the umbrella of *Sprague* v. *Ticonic* does not seem reasonable. Yet, in Respondent's Brief, an attempt is made to justify the award merely by citing *Sprague* and by quoting at

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4. Supra.

5. See Appendix.

length from the opinion of the Court of Appeals. Therein the Court and Respondent rely upon *O'Hara* v. *Oakland County*[6] as standing for the proposition that the characterization of the CCS Class as an adversary to the Druggist Class does not compel a denial of the award to Shapiro. A reading of that case, however, shows it to be easily distinguishable and clearly inapplicable to the case at bar. In *O'Hara,* appellant attorney asked the court to allow him fair and equitable compensation for his labors which had preserved a fund for adversary-appellee. In that case, however, by circumstances the interests of O'Hara's client and appellee coincided at one point, and appellee conceded that it was the beneficiary of O'Hara's services and that his efforts alone had preserved the fund for appellee. The situation in the instant case is hardly similar—and Petitioners do not consider their class the beneficiary of the labors of Attorney Shapiro, but rather something quite the opposite—namely, the victim.

Respondent, in his brief, correctly contends that the double fee concept, as applied in *Powell* v. *Pennsylvania R. R. Co.*[7] involved collecting twice from the same client for the same services, as a class member and on a private contingency fee contract. A court, in the exercise of its inherent equitable powers, will, of course, deny such a fee arrangement. Petitioners here vigorously advocate an extension of this doctrine to a multi-class action where the classes are competing for an unallocated global fund, so that where the contingent fee of an attorney for one class is increased by his action in lowering the allocation to another class, then his application for a fee from the class whose allocation he reduced, will be considered in

6. 136 F. 2d 152 (6th Cir., 1943).

7. 267 F. 2d 241 (3rd Cir., 1959).

**the nature of a double counsel fee and be denied. Such an extension of the *Powell* principle would prevent the "race" by attorneys to negotiate with defendants that might otherwise arise in all multi-class litigation and insure a maintenance of the professional level of advocacy which the public has a right to expect from members of the legal profession.**

Nowhere in his opposition brief does Attorney Shapiro meet the issue that the Record revealed that the conflict of his loyalties had a definite influence upon his conduct, namely, to increase his contingent fee while reducing the allocation to the Wholesale-Retail Class and misrepresenting to the representatives of that class the intentions of the defendants, thus placing him in a position of representing conflicting, antagonistic interests for which a court of equity would debar him from receiving any fee whatsoever.[8] (*Woods* v. *City National Bank & Trust Co.*, 312 U.S. 262, 61 S. Ct. 493, 85 L. Ed. 820; *Silbiger* v. *Prudence Bonds Corporation*, 180 F. 2d 917, 920 (2nd Cir., 1950); *cert. denied*, 340 U.S. 813, 71 S. Ct. 40, 95 L. Ed. 597 (1950); *Gesellschaft Fur Drahtlose Telegraphic M. B. H.* v. *Brown*, 78 F. 2d 410, 64 App. D.C. 357 (1935); *DeKorwin* v. *First National Bank of Chicago*, 155 F. Supp. 302, 306 (N.D. Ill. 1957).)

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8. It should be noted again, that only Attorney Rubenstein is acting for the National Class of Wholesale-Retail Druggists to procure the denial to the Shapiro firm of fees from the Wholesaler-Retailer fund. That, in fact, the Committee of Counsel have joined with him in the opposition brief, despite their assertions in the lower court about Shapiro's actions. Their assertion that this is in the best interests of the Druggist Class now is to be considered in the light of the fact that the fees of the Committee of Counsel remain under consideration by the District Court at this time.

## CONCLUSION

The equities of the case at bar must compel the Court to grant certiorari. The Respondents in their Brief use no more compelling logic than reliance upon the assertions of an Appellate and District Court who clearly have misapplied the law and misconstrued the facts in this case. The global settlement is not the benefit at issue here. At issue is a hard-fought appeal and the benefit of a $650,000 increment won by virtue of that appeal; the misplacement of fee awards and the denial of others is at issue. These issues have not been properly recognized and have not been addressed to by either the Respondents, the District Court, or the Court of Appeals. These are the bases upon which dissent has been stifled, the right of appeal denied, due process deprived, and equitable powers misused.

Respectfully submitted,

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## APPENDIX

5. That Attorney Shapiro admitted in his supporting Affidavit that defense counsel would not settle with the government entities unless a method was conceived of structuring the settlement to include the wholesaler-retailer class. This was never revealed to the Committee of Counsel for Wholesalers and Retailers. (See paragraphs 3 and 8 of Attorney Shapiro's supporting affidavit.) This is supported by the fact that the District Judge, in his Order of December 19, 1972, from which this appeal is taken, for the first time on page 38 of his Order and Opinion, states the following:

> "The defendants nevertheless insisted that the claims of the retailer class would have to be settled along with all others, and their February 6, 1969 offer of $100 million so provided."

6. Attorney Shapiro, in order to have the wholesale-retail druggist class declared a nuisance class with a nuisance allocation, procured an affidavit from Dr. Apple that the retail druggists throughout the United States had a uniform mark-up of 66⅔% (which was later proven to be false by Attorney Rubenstein).

7. Attorney Shapiro brought Dr. Apple to a meeting with the Committee of Counsel for Wholesaler-Retailers and sought to have Dr. Apple influence the committee to accept the $3 million allocation.

8. Mr. Ben Schwartz, in a supporting affidavit in opposition to Attorney Shapiro's fees, states that Mr. Shapiro was instrumental in getting Dr. Apple, "the Director of a national druggist association, to circulate to the association members in its bulletin, to discourage them from filing claims".

9. Attorney Cochrane, in his supporting affidavit (Alp. Ind. 90) to the objections to the fees of Attorney Shapiro and his law firm, stated that Mr. Shapiro on many occasions vehemently stated his position to the wholesaler-retailer class representatives that they "should not recover a dime" for their class and further stated that Mr. Shapiro's position was always adamantly antagonistic to the wholesale-retail class as admitted in his own papers.

10. Mr. Richard Levy, co-chairman of the Committee of Counsel for Wholesale-Retail Druggists, in his supporting affidavit to the objection of fees to Attorney Shapiro from his class (Alp. Ind. 90), said the following:

> "Mr. Shapiro's position throughout these proceedings, as repeatedly communicated to me, has been wholly antagonistic to the interests of the Wholesaler-Retailer Class. At one point, Mr. Shapiro indicated that if the Wholesaler-Retailer Class would not accept the $3,000,000, he would 'just as soon let the settlement go down the drain. I am ready to try my case and you're not'."

He said also that Mr. Shapiro said the following:

> "I am under pressure from my clients, the various Attorneys General I represent, to get this money back for them. They are politicians, and they have to have it, and I don't give a damn about the druggists, they're getting too much as it is."

The entire impact of Attorney Shapiro's supporting affidavit is to reveal that, while the defendants were concerned about the implications of the *Hanover Shoe* case and "felt that that decision may weaken their pass-on defense against the druggists", especially since Donovan, Leisure, Newton & Irvine, counsel for one of the defend-

ants in this case, were counsel for the successful party in *Hanover Shoe* (see paragraph 3 of Attorney Shapiro's affidavit)—Attorney Shapiro set upon a course of conduct to procure out of the $100 million settlement, $97 million for his clients and the class of government entities he purported to represent with others, and $3 million for the wholesaler-retailer druggists by preventing the Committee of Counsel for the Druggists from having direct negotiations with the defendants and by intimidating, threatening, seducing and inducing the Committee of Counsel for Druggists to accept what he was offering out of the $100 million global offer.

In fact, as unbelievable as it may seem, one of his threats is set out clearly in the District Court Judge's Order and Opinion of December 19, 1972, in which the District Court Judge says, on page 39:

> "It was stated by Shapiro that if the retailer class accepted the $3 million allocation, Shapiro would not ask a fee against the $3 million."